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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IN RE: GENE SCROGGY, WARDEN
OF THE KENTUCKY STATE
PENITENTIARY, EDDYVILLE, KENTUCKY

AND

CHRIS GORMAN, ATTORNEY GENERAL
OF THE COMMONWEALTH OF KENTUCKY PETITIONERS

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 87-56

EUGENE WILLIAM GALL, JR. PETITIONER

VS. **JUDGMENT**

GENE SCROGGY, WARDEN RESPONDENT

Pursuant to the Opinion and Order entered concurrently herewith,

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus be, and it is, hereby **dismissed**, with prejudice.

This 23d day of January, 1991.

/S/ William O. Bertelsman
WILLIAM O. BERTELSMAN, JUDGE

Copies to:

Edward C. Monahan
Erwin W. Lewis
Frederic J. Cowan
Valerie L. Salven
David A. Sexton

1/23/91 - lbb

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 87-56

EUGENE WILLIAMS [sic] GALL, JR. PETITIONER

VS.

OPINION AND ORDER

GENE SCROGGY, WARDEN, ET AL. RESPONDENTS

I. INTRODUCTION

Petitioner, Eugene Williams [sic] Gall, Jr., received the death penalty after he was convicted of murder by a jury in a Kentucky trial court. Due to a disagreement with counsel over trial strategy, petitioner acted as co-counsel during his trial, participating in the cross-examination of witnesses and arguing points of law before the court. The evidence of petitioner's factual guilt was overwhelming. The only issue of any moment at trial was petitioner's mental state at the time of the murder.

The Kentucky Supreme Court affirmed petitioner's conviction on direct appeal. Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980) (Gall

I), cert. denied, 450 U.S. 989 (1981). Petitioner then sought post-conviction relief in the state courts. The Kentucky Supreme Court also denied post-conviction relief. Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985) (Gall II), cert. denied, 478 U.S. 1010 (1986).

The case is now before this court for habeas corpus review. 28 U.S.C. § 2254. Petitioner raises twenty-five assignments of error, many of which contain multiple arguments as grounds for relief. Having thoroughly reviewed the entire record and each of petitioner's arguments, the court finds that there are no valid grounds for habeas corpus relief because each of petitioner's numerous claims is either barred by Teague v. Lane, 109 S.Ct. 1060 (1989) and Penry v. Lynaugh, 109 S.Ct. 2934 (1989), waived, or without merit. Only the most significant of these assignments of error are discussed in more detail below.

II. FACTUAL BACKGROUND AND REVIEW OF EVIDENCE

A. Background

Part of the background facts of this case were ably presented by the Kentucky Supreme court in Gall I. The court there stated as follows:

> "At about 7:35 a.m. on April 5, 1978, Lisa Jansen, a 12-year-old schoolgirl, left her home in suburban Cincinnati, Ohio, for school. She was missed very shortly thereafter when she failed to arrive at the home of a friend she had planned to meet on the way and it was ascertained that she had not gone directly to school. At about 9:25 a.m. that morning Mrs. Connie Puckett, while driving her automobile along Kentucky Highway 16 from Verona, Kentucky, toward her home in Walton, Kentucky, noticed a red jacket lying on the side of the highway near the intersection of Stephenson-Mill Road. She stopped and retrieved it, thinking that probably it belonged to one of the students attending the elementary school at Verona. She was positive that the jacket had not been there when she passed the same place a few minutes earlier on her way to Verona. Upon resuming her trip homeward she observed an open schoolbook lying in the road, stopped and picked it up. It bore the name of Lisa Jansen, and when Mrs. Puckett arrived back in Walton she telephoned the school at Verona. The school principal advised her that no one by the name of Lisa Jansen was enrolled there, but later in the day he called back and told Mrs. Puckett that a television newscast had reported a Lisa Jansen as missing. Mrs. Puckett then reported her discovery of the jacket and the schoolbook to the Cincinnati police.

The distance from Lisa's home in Ohio to the Kentucky state line at Cincinnati was 10.9 miles, and from the state line southward via Interstate 75 to the place near Stephenson-Mill Road where her body was found the next morning is 22.6 miles. Gall resided at Hillsboro, Ohio, about 45 miles the other side of the Jansen home.

At about 10:15 a.m. on April 5, 1978, a man later identified as the appellant, Gall, entered a small grocery store at the cross-roads village of Gardnersville, 17 miles or so by public roads from the vicinity of Stephenson-Mill Road (which consists of a loop leading off and then back to Highway 16), and robbed the storekeeper and her customers at the point of a .357-guage magnum stainless-steel revolver. The storekeeper, who was familiar with this type of weapon, observed from the exposed portions of the magazine that it was loaded with hollow-point cartridges. As soon as the robber left, she telephoned the local headquarters of the Kentucky State Police and reported the incident. Within a matter of minutes Gall was encountered by Detective Joe Whelan, who turned around and followed, and then by Trooper Gary Carey, who had alighted from his cruiser and was attempting to block the highway. As Carey signalled the driver to halt Gall shot him once, got out of the Ford and shot him again, and then sped onward with Whelan emptying his gun into the rear of the fleeing car. Almost immediately other police officers took up the chase, and Gall was finally brought to bay when he attempted to make a U-turn in the town of Dry Ridge and one of the troopers rammed his cruiser into the Ford. The .357 revolver was lying on the floor of the Ford. Also on the floorboard of the Ford automobile the officer found a cigar box and $112.88, the money taken at the store in Gardnersville. Gall had the further sum of $42.84 on his person.

> Subsequent laboratory tests established that a bullet removed from Trooper Carey's person had been fired from the revolver found in Gall's automobile.
>
> Shortly following his arrest Gall, by reason of his police record, became a suspect in connection with the disappearance of Lisa Jansen. In 1970 he had been charged with several counts of rape and armed robbery in southern Ohio, had been found mentally incompetent to stand trial, and had spent some 19 months in a mental institution at Lima, Ohio, after which he entered a plea of guilty to those charges and spent five years in a state pentitentiary at Lebanon, Ohio. He was 31 years of age at the time of Lisa Jansen's murder."

While petitioner admitted recalling the road block, car chase, and shooting the trooper, he claimed to have amnesia for a period of several hours beginning from the time he drove onto an exit ramp in Ohio to enter the highway that morning. TE Vol. XIII, p. 1905 (Noelker); TR Vol. II, pp. 300, 304-05 (Toppen); id., Vol. III., pp. 449-456 (Chutkow).[1] Petitioner was indicted and arraigned for the murder of Lisa Jansen on April 27, 1987 [sic]. TR Vol. 1, p. 1. Also on April 27, 1978, Dr. Robert Noelker,

---

[1] Citations to the transcript of the trial court proceedings are designated "TE." Citations to the state court record on direct appeal are designated "TR."

a clinical psychologist appointed to assist the defendant, and Dr. Lee Chutkow, a psychiatrist appointed by the court to assist the court, were appointed to examine petitioner to determine his competency to stand trial and to determine his mental state on April 5, 1978. Id., pp. 24, 30-31.

B. Competency to Stand Trial

Dr. Noelker had first examined petitioner on April 13, 1978. After his appointment by the court, he continued to examine and observe petitioner from that time throughout trial, which began on September 19, 1978. Dr. Noelker administered several tests to petitioner. On the intelligence test, petitioner scored in the top 2% to 4% of the population. Petitioner's Minnesota Multiphasic Personality Inventory (MMPI) test results indicated a schizophrenic personality disorder, paranoid type. TE Vol. XIII, pp. 1848-61.

During petitioner's examination on April 30, 1978 by Dr. Chutkow, Dr. Chutkow recommended to petitioner that he undergo "narcoanalysis" due

to his amnesia. In this procedure petitioner would have been injected with sodium amylobarbitone, colloquially referred to as "truth serum," so that he would relax his inhibitions and hopefully discover what he could recall for the period of several hours for which he had no memory. Petitioner intitially agreed, but five days later when he returned for the procedure in the presence of Dr. Chutkow and Dr. Noelker, petitioner disclaimed knowing the doctors. He claimed he was a prisoner of war, and refused to take the test on the ground that it violated his rights under the Geneva Convention. Id., Vol. XIII, pp. 1923-27 (Noelker); TR Vol. III, pp. 480-83 (Chutkow).

The issue of petitioner's competency to stand trial was first addressed in a hearing on May 26, 1978. Petitioner testified at the hearing. Dr. Noelker testified that petitioner was in remission from the time the MMPI was administered through the hearing and that he was "absolutely convenced [sic]" and satisfied

"beyond a reasonable psychological doubt" that petitioner was competent to stand trial.

Dr. Noelker also testified that the amnesia claimed by petitioner is rare in personality disorders of this type, but that he had no opinion whether the amnesiac state claimed was feigned or real. Two reports of Dr. Chutkow were admitted into evidence indicating his opinion that petitioner was competent and characterizing the POW incident as "playing a role." Based on his observation of petitioner's demeanor and the opinions of the doctors, the court found petitioner competent to stand trial. TR Vol. I, pp. 35-38; id., Vol II, pp. 188-195, 199-203, 211, 213-17.

In July, 1978, petitioner wrote the court to request that he be committed to a state hospital for the purpose of a thirty-to-ninety day period of observation. He complained that he had asked his trial counsel to do the same but had received no reply, and asked the court to hold a hearing to address this issue and "several motions concerning my defense, and/or lack

thereof." Id. Vol. II, pp. 235-36. These motions were withdrawn by petitioner at the pretrial hearing. Id., p. 237; Tr. [sic] Pre-Trial Hearing, pp. 2-3.

The issue of petitioner's competency was also raised in the pretrial hearing on September 13, 1978. Dr. Noelker testified that petitioner remained competent to stand trial. With petitioner's consent, Dr. Noelker addressed the court out of petitioner's presence. Dr. Noelker again stated that "there is absolutely no question in my mind" that petitioner is competent, but related his concern that petitioner was becoming more "disorganized" and "anxious" and that the stress of the trial could cause petitioner to regress and become imcompetent. He stated that he had "a feeling that the" POW incident was a feigned experience, but again stated that he had no concrete evidence to conclude whether the incident was feigned or not. Tr. [sic] Pre-Trial Hearing, pp. 6-16.

C. Gall's Decision to Participate in His Own Defense

Voir dire began on September 19, 1978. On the morning of September 23, 1978, petitioner informed the court that although he had no dispute with his attorneys, he wished to take a more active role in his defense by questioning and cross-examining witnesses. TE Vol. VII, p. 946. A hearing was held out of the presence of the jurors where petitioner explained, under oath, that he understood his decision could result in destroying his insanity defense and losing the trial. Id., pp. 948-57. Dr. Noelker then testified that he was concerned that petitioner had become delusional, but gave his "tentative" opinion that petitioner was still competent to stand trial on that day. Id., pp. 958-60.

On the second day of the actual guilt phase of the trial, the issue of petitioner's competency was again raised. At sidebar, defense counsel raised the motion on information they had just received from Dr. Noelker, who had

been observing the proceedings. Id., Vol. VII, p. 1135. At an in-chambers hearing, Dr. Noelker testified that he believed defendant was incompetent because the results of more recent testing showed petitioner's schizophrenia had "intensified" and because petitioner had told the doctor that he questioned and wanted to reject the use of the insanity defense, and wanted to actively participate in his defense.

In Dr. Noelker's opinion, this evidenced delusional thinking, and prevented him from rationally choosing between alternatives and assisting in his defense. Id. pp. 1137-42. Petitioner testified under oath at the hearing as follows:

> "Mr. Gall: . . .I believe with all my heart that the present line of defense is in error at this particular point. Insanity, to me should not be brought out until later on. But the whole line of questioning so far or lack of questioning has been to present the issue of insanity and insanity only. . . .
>
> Judge Neace: What do you think the defense at this point should concentrate on Mr. Gall?
>
> Mr. Gall: I think the defense at this point your Honor, should concentrate on the evidence as is heard. Grant it there is an

awful lot of the evidence but it is also circumstantial and circumstantial means that it is not hard evidence and some of the evidence may be overcomed [sic] in the juries [sic] mind based on what the prosecution has already brought out and may be [sic] they can associate this time [sic] of evidence with the defense line.

* * * * *

Judge Neace: If I am understanding you correctly, you are saying that at this point in the trial that it would be your idea to concentrate or cross-examine the witnesses and try to create in the minds of the Jury through the cross-examination doubt about the believability of their testimony?
Mr. Gall: Not the believability of the testimony Your Honor, but about the weight to be given to the evidence.
Judge Neace: Or [sic] the weight.
Mr. Gall: Yes sir.
Judge Neace: Gentlemen, that is a perfectly valid approach to this case. . . .

* * * * *

If I understand Mr. Gall, I think he is saying let's forget about the insanity until our turn comes . . . That is a defense, it has nothing to do with the Commonwealth's case, the presentation of it.
Mr. Zevely: That is right. There is no inconsistency in insanity defense and the defense that he did not do it. You don't have to . . . They are not mutually exclusive by any stretch of the imagination and he knows that.
Judge Neace: Absolutely, what he just said is that we ought to concentrate now on whether or not he did it . . . . We will worry about the exculpatory defense, if you please the insanity when we get ready to put on the defense proof. That is what he said to me. . . . Is that right Mr. Gall?
Mr. Gall: Yes sir."

Id., Vol. VIII, pp. 1147-52.

"(Mr. Zevely)Q. Eugene, are you handling your own defense because at this time you believe yourself to be more competent to present to the Jury in cross-examining these witnesses than Mr. Berger or myself?
A. In certain respects, yes.
Q. Okay, explain that.
A. I feel that primarily Mr. Berger is concerning himself with the second phase and not the first phase, as I understand it and you have concerned youself [sic] with the first phase primarily but also primarily in the realms of insanity as a defense and the primary defense.
Q. Okay, so you would feel more competent at this point to present your defense of not guilty period than I could - you think you are more competent to do that than I am?
A. Correct.
Q. Okay, have you discounted the defense of insanity? In other words you don't think it is worth putting forth at all, is that correct?
A. At this point that would be correct.
Q. And you know that you have been diagnosed paranoid schizophrenic, is that correct?
A. Correct.
Q. And you know what the people at Lima have diagnosed you and what they have said and what Doctor Noelker has said, is that correct?
A. Yes sir.
Q. And in spite of knowing all of this, you feel that in essence the defense of insanity should not even be raised.
A. Yes sir.

* * * * *

(By Mr. Mathis)Q: Mr. Gall, one further question. Only you lived through April 5, 1978, do you believe that you were insane on that day?
A. I do not believe that I committed that crime. I couldn't have committed it.

Q. I didn't ask you about the commission of the crime. Do you in fact believe that you were legally insane as you have heard Mr. Zevely define it in voir dire examination on that day, in your own personal opinion?
A. Grant it there is a period which I cannot remember what transpired, but as far as legally insane, no, I was not legally insane.
Q. Is that why you don't feel it is an appropriate defense in your case?
A. No, I feel the reason that it is not appropriate is because by the evidence that the Jury will hear will tend to show or at least put some doubt, reasonable doubt in their minds as is necessary that I did not commit the crime."

Id., pp. 1159-61.

The trial judge found that in his "own personal assessment" petitioner "exhibited quite clearly to me an understanding of the nature and the proceedings and the seriousness of the proceedings and my personal belief is that he is extremely capable of assisting his counsel." Id., p. 1167. In an "abundance of caution," however, the trial judge had petitioner examined by another psychiatrist that evening. Id.

The following morning, outside the presence of the jury, Dr. Kenneth Lanter testified that he had examined petitioner for forty-five

minutes the night before and examined Dr. Chutkow's first report. Dr. Lanter concluded that petitioner was competent to stand trial, and that he was competent to make the decision to participate actively in his defense. Id., pp. 1192-1200; id., Vol. IX, pp. 1201-08. The trial judge found that petitioner understood the nature and consequences of the proceedings against him and was capable of assisting counsel and participating rationally in his own defense. Id., p. 1208.

D. Evidence That Gall Killed Lisa Jansen

The circumstantial evidence produced by the state to establish that petitioner committed the killing is overwhelming. The evidence placed petitioner near the area where the victim's body was found around the time of the murder, and identified petitioner as the person who robbed the store. See id., Vol. VII, pp. 1078, 1084-86; id., Vol. VIII, pp. 1087-98; id., Vol. IX, pp. 1221-29, 1257-59, 1268, 1286-92, 1300-02; id., Vol. X, pp. 1412-14; id., Vol XII,

pp. 1664-67. The gun found on petitioner at the time of his arrest was identified as the gun used by petitioner when he robbed the store. Id., Vol. IX, pp. 1232-36, 1244-47, 1277-79.

Ballistics tests identified the bullets recovered from the bodies of the police officer and the victim as being shot from petitioner's gun. Id., Vol XII, p. 1719-36.

Red nylon carpet fibers from the car petitioner was driving matched the red nylon fibers found on the victim's clothing. Id., pp. 1772-75. Petitioner's car had three "Uniroyal G78-15 steel-belted radial" tires and one "Atlas G78-15 ordinary" tire. Several impressions of tire tracks taken from the area where the victim's body was recovered were made by Uniroyal-type tires as those on petitioner's car. Id., pp. 1708-18; id., Vol XI, pp. 1522-26. The semen stain found on the front seat of petitioner's car and the semen samples from the victim were consistent with a person with petitioner's blood type having had sexual intercourse with a person of the victim's blood

type. Id., Vol. XII, pp. 1760-67, 1771. A long hair was recovered from petitioner's car. The hair and the blood on it was consistent with the victim's hair and blood type. Id., pp. 1768-71.

E. Insanity Defense

Petitioner sought to establish that he was insane on April 5, 1978, through the live testimony of Dr. Robert Noelker, and through the deposition of Dr. John Toppen, a psychiatrist retained by petitioner's family. Id., Vol. XIII, pp. 1823, 1835. The prosecution presented the lay testimony of the arresting officers and eyewitnesses to the robbery that petitioner appeared quiet, not excited, not nervous, and had steady hands and a normal voice. Id., Vol. IX, pp. 1231-34, 1238, 1241, 1256. The prosecution also presented the videotape and written transcription of the deposition of Dr. Lee Chutkow on rebuttal. Id., Vol. XIII, p. 1939.

Throughout his habeas pleadings, petitioner argues that the evidence of his insanity or

extreme emotional disturbance was "uncontroverted" and "overwhelming." Petitioner's characterization of the evidence is unsupportable. Rather than being "uncontradicted" or "overwhelming," the evidence of his mental state on the morning of April 5, 1978, was inconclusive and conflicting.

For example, the experts were in agreement on several points. Of those asked, they agreed that it is possible for two psychiatrists to review the same data and examine the same patient and arrive at different conclusions. Id., Vol. XIII, pp. 1882-85 (Noelker); TR Vol. II, pp. 294-97 (Toppen). Dr. Noelker and Dr. Chutkow agreed that it is "extremely difficult" if not "virtually impossible to render a diagnosis of a person's mental state on a particular day where that person claims amnesia surrounding the very time period in question and where they had not interviewed the people who saw that person during that time, on that day, or during the weeks or months preceding that day. TE Vol. XIII, p. 1924-27 (Noelker); TR

Vol. III, pp. 458, 470-71, 485-90, 493-94 (Chutkow).

The experts also agreed that the MMPI results indicated schizophrenia of a chronic nature. The doctors agreed that as a general matter this type of mental illness can be accompanied by a loss of contact with reality, hallucinations, and inability to control one's behavior, but that even though labeled "chronic," the illness can be accompanied by periods of "remission." Finally, they also agreed that it is rare, although not impossible, for a person with this illness to develop amnesia. An amnesiac state could be brought about by many things, for example, by a trauma such as a head injury, committing a heinous crime, or being arrested and charged with a heinous crime, or by an acute schizophrenic state. TE Vol XIII, pp. 1855, 1867, 1880-91, 1905-07, 1916 (Noelker); TR Vol II, pp. 279-82, 286 (Toppen); TR Vol III, pp. 468-71, 474-78 (Chutkow).

In contrast, the doctors' testimony is conflicting concerning petitioner's state of mind during the hours of April 5, 1978 for which petitioner had no memory, concerning the nature of "remission," and concerning the POW incident.

In Dr. Toppen's opinion, petitioner's lack of recall and decision to act as co-counsel evidenced that he was in a state of distorted reality, even though his high I.Q. would make him "appear to be more normal than he really is." Dr. Toppen concluded that because defendant evidenced distorted thinking "it is also both possible and likely" that petitioner was in a psychotic paranoid schizophrenic state at the time the crime was committed and unable to conform his conduct to the law because of this condition. TR Vol. II, p. 279-86, 292-93. He also stated that there was no "question whatever" in his opinion that petitioner was acting under the influence of an extremely disturbed mind on April 5, 1978. Id., pp. 290-91. He explained that the rationale for his conclusions was that even though there can be

periods of "remission," chronic schizophrenia is never completely curable and only appears "better or worse" and that to the extent any person with this illness conforms his conduct to any law, such conformity is a mere coincidence. Id., 291-92, 313, 319-20, 326-30. He regarded petitioner's amnesia as consistent with this particular mental illness. Id., pp. 282-83.

While Dr. Noelker conceded that throwing a victim's clothes along the road and robbing a store in an isolated area were consistent with an attempt to escape, he was of the opinion that petitioner lacked the capacity to conform his conduct to the law and acted under the influence of extreme emotional disturbance as a result of a psychotic compulsion due to his schizophrenia and was not in remission on April 5, 1978. He explained the rationale for his conclusion was that if petitioner had committed the crime in the manner indicated by the evidence, petitioner would have been "home free" and had "no reason to run." TE Vol XIII, pp. 1880-81, 1911-16.

He also testified that while this type of illness "never really goes away" petitioner could have periods of remission at which time he would be "perfectly legally sane." Without having seen petitioner on that morning, he did not know whether petitioner was in a state of remission or not. Id., pp. 1885, 1888-90, 1917-20, 1931-32.

He also conceded that the test results indicating petitioner manifested chronic paranoid schizophrenia could have been a consequence of being incarcerated and charged with rape. Id. 1890-91. He testified that refusing to submit to the injection of sodium amytal is as consistent with an attempt to escape detection as it is with a "very disturbed mind which is extremely afraid of remembering things which are very painful" and that he could not formulate an opinion whether the POW incident was feigned. Id. 1926-27.

Dr. Chutkow repeatedly testified that [he] did not see petitioner for the purpose of making a diagnosis, nor did he direct his evaluations

and examinations of petitioner to determine his state of mind on April 5, 1978. TR Vol. III, pp. 445, 450, 463. Dr. Chutkow could not say with certainty whether petitioner was sane during the period for which he claimed amnesia because petitioner's lack of memory precluded ascertaining the facts. In his opinion, however, "I can rule out acute schizophrenia in the hours preceding" the murder. Id., pp. 472, 488-89 (emphasis added).

Dr. Chutkow was presented a lengthy hypothetical situation that completely incorporated all of petitioner's past psychological history and the crimes with which he was currently charged, and asked whether those facts taken as true "would change your mind as to whether or not this man is a candidate for the condition that you have described as a paranoid schizophrenic?" Id., pp. 469-70 He replied "No. I don't feel he was schizophrenic during the hours preceding his arrest. He may certainly have been at the time of those examinations and that was eight years

ago, or seven years ago." Id., p. 471 (referring to petitioner's 1970 arrest and commitment to Lima State Hospital for the Criminally Insane) (emphasis added). He explained the reason for his conclusion as follows:

> "I asked him what he was doing in the hours prior to the beginning of the amnesia and he told me a fairly realistic coherent account of him going toward -- I will have to quote from my notes here, driving from one city in Ohio to another city where he was to work, to study some medicare payments to a nursing home. This was his explanation, his goal was to get there and do this realistic task and he described the routes he took. I asked him if he remembered anything at that time and then I recorded proposed sometimes [sic] of schizophrenia which are typical symptoms including symptoms that he was being followed, persecuted, spied upon, plotted against, him feeling he was hearing voices, commanding him to do something, feeling that of under somebody's control, his thoughts were stolen from him, **these are the classical symptoms of schizophrenia and he had none of these nor did he claim that he couldn't remember what he was thinking.** He was thinking realistically about his job that he had to do, to go to the nursing home the next day and acquire some data. **So, from what he told me there, I could disown [sic] no symptoms of schizophrenia for those hours before. Nor even from the dates prior to this, he had held a job, he claimed to be getting along well in his community.** I believe he had a girlfriend that he was planning to marry and **I received nothing**

> **from him at that examination indicative of schizophrenic symptoms, nor did he have them afterwards, after he was arrested and put in jail. He was in jail three weeks or so in the cell and he developed none of these symptoms there."**

Id., pp. 456-57 (emphasis added).

Dr. Chutkow disagreed with Dr. Toppen's statement that as a general matter persons with this type of disorder can never conform their conduct to the law. He stated: "My experience is quite the other way, it is my experience in examining and treating many chronic schizophrenic individuals who are functioning in communities, working in jobs and undergoing treatment and certainly are consciously doing knowingly and accurately and correctly conforming with the law in the vast of their daily lives." Id., p. 459.

When asked if a cause of amnesia is a paranoid schizophrenic state, Dr. Chutkow replied it "is one of them, it is not the most common nor the most intense" and "I have seen very few in my experience of paranoid schizophrenics who have had a sudden gap of [a]

couple hours which they are totally amnesiac. Most schizophrenics I have seen who have amnesia recall the things they have done which can include criminal behaviors, partially are denying their total responsibility or denying feeling anything about it or denying the previous acts, but it [is] not just a complete blank which he presented to me." Id., p. 474. Dr. Chutkow believed that petitioner's amnesia was a conscious decision to tell nothing of the hours preceding his arrest, because of his "awareness of the consequences of his disclosure to an arresting officer or a psychiatrist or a jury, assuming trial." Id., pp. 491, 492.

Dr. Chutkow further testified that acting as a POW was not a manifest sign of petitioner's paranoid schizophrenia because "I have never seen a schizophrenic do this. He is denying the complete situation that he had previously, a few days earlier, agreed to. In my experience, this did not happen with that degree of suddenness in this type of situation," id., p. 482, and because acting in this behavior is "a very

different role in personality and different environment than what there is, this is not a characteristic of schizophrenia. It is used [sic] to be considered a hysterical type of personality." id., p. 483.

He stated that it is unusual for a layman to assume active management of his defense, but that "it seems to be more done now in a daze, whether it is by schizophrenia or it is by people who feel they can't trust their lawyers, the lawyers feeling they are not competent, . . . but I can't say whether it is the psychotic grandiosity or a very shrewd attempt to save himself of [sic] serious consequences." Id., pp. 477-78.

III. ANALYSIS

A. Competency to Stand Trial

In assignment of error # 3, petitioner raises three arguments: the trial judge erred in finding him competent to stand trial; the trial judge erred in failing to sua sponte hold a mid-trial evidentiary hearing after viewing

petitioner conduct portions of his defense; and that the trial judge erred in allowing petitioner to act as co-counsel, when it was "clear" petitioner was incompetent, and without conducting a more thorough inquiry whether petitioner understood the effect his decision may have on his insanity defense or in mitigation.

The test for whether petitioner was competent to stand trial is whether he had the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). The test used by the Kentucky courts and the trial judge is similar: a defendant must have a "substantial capacity to comprehend the nature of the consequences of the proceeding pending against him and to participate rationally in his own defense." Commonwealth v. Strickland, 375 S.W.2d 701, 703

(Ky. 1964); see also e.g., Pate v. Smith, 637 F.2d 1068, 1071 (6th Cir. 1981).

In determining whether a failure to conduct a competency hearing sua sponte amounts to constitutional error, the standard of review is whether "a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to the competency to stand trial." Williams v. Bordenkircher, 696 F.2d 464, 467 (6th Cir.), cert. denied, 461 U.S. 916 (1983); see also Pate, 637 F.2d at 1072.

Finally, in determining whether allowing a defendant to "manage" his own defense is constitutionally infirm, the test is whether petitioner "knowingly and intelligently" insisted on acting as co-counsel, thereby partially foregoing the "right to counsel:"

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is

doing and his choice is made with eyes open.'"

Faretta v. California, 422 U.S. 806, 835 (1975).

The Sixth Circuit has noted that the standard of competency to waive counsel is "vaguely higher" than the standard of competency to stand trial. United States v. McDowell, 814 F.2d 245, 250 & n.2 (6th Cir.) (citing Westbrook v. Arizona, 384 U.S. 150 (1966), and Konigsberg v. Vincent, 526 F.2d 121 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976)), cert. denied, 484 U.S. 980 (1987). Neither Westbrook, McDowell, or Konigsberg define the "vaguely higher" standard. The Ninth Circuit adopted Westbrook's "higher" standard in defining the competency necessary to enter a guilty plea, and defined the standard as whether "a mental illness has substantially impaired [defendant's] ability to make a reasoned choice among the alternatives present [sic] to him and to understand the nature of the consequences of his plea." Sielig v. Eyeman, 478 F.2d 211, 215 (9th Cir. 1973); see also Heral v. Franzen, 667 F.2d 663, 637-38

(7th Cir. 1981) (rejecting two different standards for guilty pleas and competency to waive counsel).

In the context of this case, Sielig's higher standard would be defined as whether petitioner's mental illness substantially impaired his ability to make a reasoned decision between having his counsel rely solely on the insanity defense or to pursue a reasonable doubt theory as co-counsel with the attendant possible consequences of acting as co-counsel would have.

The premise underlying each of the arguments in this assignment of error, and the premise underlying Dr. Noelker's and Dr. Toppen's opinions on competency, is that although on the surface petitioner appeared competent, his disagreement with defense counsel over focusing solely on the insanity defense and his preferred defense strategy of focusing on raising a reasonable doubt as to the factual guilt as well, was entirely irrational, manifesting "delusional thinking" -- a "break from reality." Therefore, they [sic] reason

petitioner was incompetent to stand trial or to knowingly and intelligently chose [sic] to insist on participating as co-counsel in the defense.

The trial judge's conclusion on competency to stand trial, which implicitly also finds petitioner competent to make the decision to assist in his defense, see TE Vol. IX, p. 1207-09, is entitled to the presumption of correctness under § 2254(d), unless the finding is not fairly supported by the record. E.g., Demosthenes v. Baal, 110 S.Ct. 2223, 2225 (1990); Chapin v. Marshall, 704 F.2d 335, 337 (6th Cir. 1983), cert. denied, 464 U.S. 1047 (1984).

The trial judge was in a position to observe petitioner's demeanor while testifying and acting as co-counsel. Based on the previous review of the evidence as set forth above, and based on this court's review of the entire record, there is ample support in the record for the judge's conclusion, regardless of whether a "vaguely higher" standard is required for his

competency to make the decision to act as co-counsel.

The written record reflects that petitioner, who tested as highly intelligent, had much more than a substantial capacity to consult with his attorneys, psychiatrists, and the court with a rational understanding. It reflects that he understood all too well the nature of the proceedings against him. Specifically, he understood the various trial strategies from which to choose, the interrelationship between the guilt phase of the trial and the sentencing phase, and the bearing that extreme emotional disturbance/insanity would have at sentencing. He advocated an entirely valid approach and fully understood the consequences that his acting as co-counsel could have on his extreme emotional disturbance/insanity defense. See e.g., Blackmon v. Armontrout, 875 F.2d 164, 166 (8th Cir.), cert. denied, 110 S.Ct. 337 (1989); McDowell, 814 F.2d at 249-50; Chapin, 704 F.2d at 337; Williams, 696 F.2d at 466-67; Owen v. United States, 660 F.2d 696, 702 (6th Cir. 1981).

Neither petitioner's two questions of the state trooper and pathologist on cross-examination (as described below) standing alone, nor these questions in conjunction with his other question on cross-examination or other evidence of his mental state are sufficient to have raised a reasonable doubt in the mind of the trial judge of petitioner's competency, thereby necessitating a second mid-trial competency hearing to be called sua sponte. E.g., Williams, 696 F.2d at 467; Owens v. Sowders, 661 F.2d 584, 586 (6th Cir. 1981).

On one occasion, petitioner asked the pathologist if the retina takes a picture of that which a dying person last sees; on another, he also accused a state trooper of shooting Lisa Jansen.

With respect to the pathologist, it is plain that the question was designed to test the pathologist's knowledge:

> "[Petitioner]Q: Dr. Jolly, you testified about your medical training and your medical experience, do you also subscribe and read various amounts of medical publications?
> A: Intermittently, yes sir.

Q: Okay, during the readings of these medical journals or medical publications have you ever known of a procedure or read about a procedure in which you can take the eye from a person and put a camera up to the retinal [sic] or the lens of the eye and photograph what that eye last saw by the impressions left on the back of the eyeball which would be I believe the retina. Are you aware of that procedure?
A: I have heard of this theory and it is completely erroneous.
Q: That is all."

TE Vol. XI, p. 1610. As respondents point out, the procedure was unsuccessfully employed by Scotland Yard in 1888. Respondents' Reply, p. 29 n.2.

With respect to the state trooper, the last witness of that day of trial, petitioner cross-examined the witness extensively, and elicited that the officer carried the same type of gun which was capable of firing the same type of bullets found in petitioner's car.

Petitioner's final question to the trooper summarized this evidence and in quintessential Perry Mason fashion, stated "I charge you with shooting that second shot through Smith & Wesson Revolver .357 using a .38-caliber bullet to put that second one in to use as evidence. No

further questions, Your Honor." TE Vol. X, pp. 1491. At that point, it had not yet been established when the two gunshot wounds had been inflicted. This statement merely made explicit what was implicit in petitioner's previous line of questioning: someone else could have committed the murder. It was not until later in the trial that the pathologist testified the wounds had been inflicted within the same time frame. Id., Vol. XI, p. 1601; see also Gall I, 607 S.W.2d at 106 n.1.

Finally, habeas counsel argues that the trial judge failed to take all of the steps necessary to ascertain that petitioner "knowingly and intelligently" made the decision to act as co-counsel because, while counsel questioned petitioner[:]

> "an on-the-record sufficiently thorough inquiry by the trial judge did not take place. Gene Gall testified that the dangers of representing himself were explained to him. . . . What were these dangers? The trial judge did not explain any dangers to Gall with any thoroughness. At best, the trial judge merely asked Gall if he understood the danger of acting as his own lawyer might cause the defense of insanity. Nobody explained to Gall the dangers related

> to the mitigation of sentence insanity could play in the penalty phase and the dangers of an increased sentence due to his self-representation. The extreme emotional disturbance defense was never discussed."

Brief for Petitioner, p. 79. Habeas counsel explains that the trial judge should have told petitioner that "objectively, [he] was severely undercutting the defense of insanity or waiving it by his representation of himself." Id., p. 80.

There was no need for the trial judge to have spoken these exact words to petitioner. Petitioner was examined extensively on two occasions regarding his decision. A review of the record discloses that not only did the trial judge reiterate the same after defense counsel elicited that petitioner realized he was on trial for murder facing the death penalty and could "lose" if he acted as co-counsel, but that petitioner fully understood the importance of the role extreme emotional disturbance/insanity would play during the sentencing phase. The record discloses that petitioner was competent

to make his decision and did so with his eyes open.

Accordingly, the court finds that assignment of error # 3 is without merit.

B. Extreme Emotional Disturbance

Petitioner argues that the Commonwealth failed to prove the lack of extreme emotional disturbance beyond a reasonable doubt. The concept of "lack of extreme emotional disturbance" is peculiarly a matter of Kentucky law. Apparently, the concept is intended to modernize the jurisprudence of common law manslaughter. Gall I, 607 S.W.2d at 109; see also Wellman v. Commonwealth, 694 S.W.2d 696, 697 (Ky. 1985).

The Kentucky Supreme Court dealt with this issue in Gall I. The court finds no federal constitutional deficiencies in the Kentucky Court's analysis. Accordingly, the court finds that assignment of error # 7 is without merit.

C. Insanity

Petitioner argues that the evidence establishes by a preponderance of the evidence that he was insane when he committed the murder. Petitioner bears the burden of proof of his insanity. Chaney v. Rees, No. 86-5940 (6th Cir. 1987) (unreported) (finding habeas court applied incorrect standard in finding burden rested with Commonwealth of Kentucky to prove sanity beyond a reasonable doubt; "[t]he prosecution's responsibility, in responding to Chaney's evidence of insanity, was to create an issue of fact for the jury as to his sanity, not to establish his sanity beyond a reasonable doubt.").

Petitioner first argues that lay testimony "should be considered worthless" because these witnesses were unfamiliar with petitioner's background and habits and they were not concerned with petitioner's sanity when observing him, citing United States v. Burks, 547 F.2d 968 (6th Cir. 1987), rev'd, 473 U.S. 1 (1978); United States v. Smith, 437 F.2d 538

(6th Cir. 1970); and Graham v. Commonwealth, 420 S.W.2d 575 (Ky. 1967). He also argues that this court must not consider the testimony of Dr. Chutkow, since his examination and testimony was limited to the issue of competency and not sanity. The foregoing is not a correct statement of the reviewing posture of this court on habeas corpus.

This court must view the evidence and the inferences to be drawn therefrom in the light most favorable to the prosecution. Any conflicting inferences arising from the record must be resolved in favor of the prosecution. Additionally, it is beyond the province of this court to weigh the credibility of witnesses. The jury's resolution of questions of credibility and demeanor are entitled to special deference, and credibility conflicts must be resolved in favor of the prosecution. See e.g., Patton v. Yount, 467 U.S. 1025 (1984); United States v. Vannerson, 786 F.2d 221, 225 (6th Cir.), cert. denied, 476 U.S. 1123 (1986); Brown v. Davis, 752 F.2d 1142, 1144 (6th Cir.

1985); Walker v. Engle, 703 F.2d 959, 969 (6th Cir.), cert. denied sub nom, Walker v. Marshall, 464 U.S. 962 (1983); Stacy v. Love, 679 F.2d 1209 (6th Cir.), cert. denied, 459 U.S. 1009 (1982); Scott v. Perini, 662 F.2d 428, 432 (6th Cir.), cert. denied, 456 U.S. 909 (1981).

Viewing the evidence on this issue, the inferences to be drawn therefrom, and the credibility conflicts among the experts in the light most favorable to the prosecution, the court concludes that any rational juror could have found that petitioner failed to show by a preponderance of the evidence that he was insane when he murdered Lisa Jansen.

The jurors were not required to accept the experts' opinions that petitioner was acting under delusions or distorted thinking at the time of the murder. Instead, the jurors could have made their decision solely based on the testimony of the witnesses who observed petitioner immediately following the murder during the robbery and his arrest; based on the circumstances surrounding the murder, such as

the body being placed in a secluded spot and the victim's belongings thrown alongside the road; based on the undisputed evidence of petitioner's high intelligence; and based on petitioner's demeanor during trial, in which he behaved in a rational, professional, and highly competent manner.

The two isolated instances of conduct that the jurors would have seen during trial that petitioner cites elsewhere in his brief as evidence of his incompetency, when viewed in context, amount to nothing more than "melodramatic" flair in petitioner's style for ending cross-examination. See supra, pp. 22-23; Gall I, 607 S.W.2d at 105-06. Any reasonable juror could have concluded that petitioner had the intelligence to analyze his position and to fabricate the amnesia and POW incident in an effort to prohibit the prosecution or his experts from obtaining information which could be used against him. Any reasonable juror could have also concluded that petitioner's motive for acting as co-counsel was to bolster his insanity

defense. See Maupin v. Smith, 785 F.2d 135, 140 (6th Cir. 1988).

Furthermore, even assuming that the jurors accepted the diagnosis of paranoid schizophrenia, the experts agreed that amnesia was rare among schizophrenics or that the stress of the murder itself could have brought on the state of amnesia. They all testified that paranoid schizophrenia can be accompanied by periods of remission even if diagnosed as "chronic." In pinpointing petitioner's mental state on April 5, 1978, Dr. Toppen reasoned that because petitioner's decision in September to act as co-counsel was "delusional," then he also must have been delusional the preceding April. Dr. Noelker reasoned that petitioner must not have been in a period of remission in April because petitioner had "no reason" to run from a crime to which there were no eyewitnesses.

On the other hand, Dr. Chutkow testified that while he could not be certain of petitioner's mental state during the murder and that he did not test petitioner for sanity

purposes, he ruled out any manifestation of acute schizophrenia immediately preceding the period during which petitioner claimed amnesia. This conclusion was based on the fact that the information petitioner did remember in the hours and months preceding did not display any classical symptoms of schizophrenia. Nor did he observe any symptoms of acute schizophrenia in petitioner three weeks later, after having been under the stress of arrest and incarceration. To the extent the jurors credited any of the expert testimony, any rational juror could have credited Dr. Chutkow's opinion concerning petitioner's mental state as more credible indicia of petitioner's mental state during the murder.

Petitioner also argues that he is entitled to a judgment of acquittal because the only competent experts who testified as to his sanity (his own) testified that he was insane. Dr. Chutkow proffered some opinions on this subject, but had not reviewed all the pertinent records.

The problem with this argument is that the burden of proof on this issue was on petitioner. Insanity was an affirmative defense. Therefore, the jury could reject the testimony of petitioner's experts on credibility grounds. It was so held in Chaney v. Rees, supra, note 2 (copy attached). Although unpublished, this case is controlling.

Accordingly, the court finds that assignment of error # 1 is without merit.

D. Lack of Jury Instruction On Civil Commitment

In assignment of error # 6, petitioner argues that failure to instruct the jury that he could be civilly committed if acquitted by reason of insanity is fundamentally unfair, in violation of the fourteenth amendment. He also argues the failure renders the jury determination of guilt and his sentence unreliable in violation of the eighth amendment, because at the time of his trial state law permitted the prosecutor to comment that an

acquittal by reason of insanity results in "turning defendant loose."

The majority of states and federal jurisdictions hold that jurors should not be concerned with the disposition of a defendant after acquittal by reason of insanity, and either hold that failure to give a dispositional instruction is not erroneous or is prohibited altogether. A minority of jurisdictions require a dispositional instruction. See Erdman v. State, 542 A.2d 399 (Md. App. 1988); ABA Criminal Justice Mental Health Standards 7-6.8 & Commentary (1989). At the time of petitioner's trial, Kentucky was among those jurisdictions that prohibit such instructions.

Nevertheless, at the time of petitioner's trial, Kentucky law did not prohibit the prosecutor from commenting to the jury "that in the event of an acquittal on the grounds of insanity there is very little, if any, assurance that they will not soon be at large again." Jewell v. Commonwealth, 549 S.W.2d 807, 812 (1977); see also Edwards v. Commonwealth, 554

S.W.2d 380 (1977), cert. denied, 434 U.S. 999 (1977).

In his appeal in the state court, petitioner argued that under the Jewell and Edwards decisions, the prosecutor could permissibly comment that if acquitted by reason of insanity there is no assurance that petitioner would be at large again, but that a defendant was not entitled to an instruction of the possibility of civil commitment. The Kentucky Supreme Court rejected his argument drawing a distinction between what these cases permit by way of comment and prohibit by way of instructions:

> "It should be understood, however, that Edwards does not prohibit defense counsel from reminding the jury that if the defendant is acquitted on the grounds of insanity at the time of the offense, and if he lapses into that condition again, there are legal means to bring about his commitment, because that is the simple truth. But it cannot be truthfully said that he will be committed, because if he is sane enough to be participating in the trial there is very little likelihood of his being validly found insane immediately thereafter. The most that defense counsel can say, and we have never held that he cannot say it, is that if after the defendant is acquitted there appear reasonable grounds to believe he is insane and ought to be committed to an institution,

> he can be tried in a civil commitment proceedings [sic]. We adhere, however, to the view that the prospects of what may or can happen after the verdict do not belong in the instructions given by the court to the jury. There is no sensible due process question in this respect."

Gall I, 607 S.W.2d at 111.

The following year in Paul v. Commonwealth, 625 S.W.2d 569, 570 (Ky. 1981), the Kentucky Supreme Court held that under Jewell and Gall I, defense counsel and the prosecution are "equally at liberty to point out, in addressing the jury" that if acquitted by reason of insanity defendant can be subject to civil commitment proceedings. The court stated that the "reason we have held such remarks permissible is that they are within the realm of common knowldge and fair comment." But in Paul, the prosecutor attempted to establish lack of a guarantee of civil commitment by way of testimony, and the court held that although commentary was permissible, the subject could not be "introduced in the form of proof, or . . . pursued in further detail." Id. at 570.

Two and one-half months later, however, the Kentucky Supreme Court overruled Jewell, Gall I, and Paul in Payne v. Commonwealth, 663 S.W.2d 867, 870 (Ky. 1981), cert. denied, 456 U.S. 909 (1982), stating:

> "" [sic] While denying a jury instruction in the consequences of an acquittal by reason of insanity, our cases have allowed both prosecuting and defense counsel during closing arguments to comment on the consequences of an insanity verdict. . . .
>
> The main function of the jury is to determine guilt or innocence. The constitutional right to a trial by jury is limited to that determination. . . . The consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury's finding of fact and may serve to distort it. For that reason we now hold that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial.
>
> To the extent that Jewell, Gall, and Paul, supra, are inconsistent with this decision, they are overruled. We adhere to the reasoning of Edwards, supra: external considerations have no legitimate bearing on the jury's factual determination of guilt or innocence."

Id. at 870. On the basis of Payne, the Kentucky Supreme Court found that a prosecutor's comments that defendant should not be "turned loose to kill again" was one of the many errors

necessitating reversal. Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984), cert. denied, 469 U.S. 860 (1984); see also Sanborne [sic] v. Commonwealth, 754 S.W.2d 534, 544 (Ky. 1988) (same).

In post-coviction relief proceedings, petitioner's trial counsel testified that he could not recall why he did not raise the issue of civil commitment in his closing arguments to the jury, but surmised that to do so would have been futile, since the prosecutor would have responded that there was no guarantee of the length of civil commitment. Trial counsel stated that he did not believe the state of the law at that time foreclosed him from commenting on the availability of civil commitment. Tr. [sic], R[Cr] 11.42 Hearing, Vol. II, pp. 287-89.

In this habeas action, petitioner argues that at the time of his trial it was unfair for Kentucky law to prohibit him to comment on the availability of civil commitment or demand a jury instruction of the same, but to permit the

prosecutor to elude to the consequences of "turning him loose."

As the forgoing discussion of Kentucky law reveals, his argument is premised on Payne, and not on the state of the law at the time of his trial. At the time of his trial, the issue of whether he could have commented on the availability of civil commitment was at the most unclear, but a logical reading of Jewell would support the conclusion that defense counsel could so comment. During post-conviction relief proceedings, trial counsel testified that he did not believe that the law precluded him from making such comments. Gall I held that he would not have been precluded from doing so. On post-conviction review, petitioner argued that Gall I should be reconsidered in light of Payne and that in Gall I the court applied the law in an arbitrary and unfair manner in failing to reach the same result as it later reached in Payne. The court rejected this argument. Gall II, 702 S.W.2d at 45; Appellant's Brief, R. [sic] 11.42, Issue XI, pp. 65-66.

Petitioner is challenging the manner in which the Kentucky Supreme Court construed Jewell and Edwards in Gall I, and as such he fails to state a claim cognizable in habeas corpus. A federal habeas court does not review a state court's interpretation of its own law; moreover, absent invidious discrimination, a "misapplication" of state law does not necessarily present a federal constitutional question. Dorsey v. Parke, 872 F.2d 163, 168 (6th Cir. 1989), cert. denied, 110 S.Ct. 103 (1989); Ovido v. Jago, 809 F.2d 326, 328 (6th Cir. 1987); Combs v. Tennessee, 530 F.2d 695, 698 (6th Cir.), cert. denied, 425 U.S. 954 (1976); see also Burnett v. Illinois, 619 F.2d 668, 671 (7th Cir. 1980), cert. denied, 449 U.S. 880 (1980); Grace v. Butterworth, 635 F.2d 1, 4 (1st Cir. 1980), cert. denied, 452 U.S. 917 (1981).

Given the Edwards and Jewell decisions, the Kentucky Supreme Court cannot be deemed to have "misapplied" the law nor to have done so arbitrarily or discriminatorily for the purpose

of sustaining petitioner's conviction. Although the decision on post-conviction review could be clearer, this court reads the Kentucky Supreme Court's rejection of petitioner's contention as indicating that it declined to apply Payne retroactively. See Bennett, 619 F.2d at 671 & n.5.

Moreover, because defense counsel was not precluded from commenting on civil commitment but at that time chose not to do so, the lack of an instruction does not render the trial fundamentally unfair. Under the state of the law at the time of his trial, trial counsel did not believe he was precluded from commenting on the issue, and raised this issue of civil commitment briefly with one juror on voir dire, but chose not to comment on the same. This trial tactic is understandable since [sic] had the defense commented on civil commitment, the prosecutor could have responded regarding the inadequacies of civil commitment. Defense counsel avoided any undue emphasis on the issue by that tactic.

Finally, petitioner cites no federal habeas decision, and this court has not found one, that holds permitting the prosecutor to make a comment that an acquittal by reasons of insanity would result in "turning defendant loose," at the same time prohibiting an instruction on civil commitment, amounts to a deprivation of due process. Therefore, alternatively the court finds that petitioner seeks a new rule within the meaning of Teague v. Lane, 109 S.Ct. 1060 (1989) and Penry v. Lynaugh, 109 S.Ct. 2934 (1989), and that the rule he seeks does not fall within either of the two exceptions to Teague's bar against applying new constitutional rules retroactively in habeas proceedings; see e.g., Hardy v. Wigginton, 917 F.2d 24 (6th Cir. 1990) (unreported).

Accordingly, the court finds that assignment of error # 6 is without merit.

CONCLUSION

The court has thoroughly reviewed the transcripts in this case and believes that

petitioner received due process in the state court. The evidence was in dispute on his insanity defense, but the burden was on him to establish it, and the jury was justified in rejecting it. By the same token, petitioner gave every appearance of being competent to stand trial and capable of participating in his own defense.

These are the only genuine issues in this proceeding since the evidence that he kidnapped, brutally raped and murdered Lisa Jansen is overwhelming.

Opponents of the death penalty will not agree with this decision. However, the people of Kentucky have decided -- through their representatives -- to maintain the death penalty. The Supreme Court of the United States has decided that in serious cases like this it is constitutional. Therefore, the Commonwealth was within its rights in sentencing Eugene Gall to death for his brutal crime.

Therefore, the court being advised, it is hereby ordered that the petition for a writ of habeas corpus be, and it hereby is, DENIED. A separate judgment will enter dismissing the petition.

This 23rd day of January, 1991.

/S/ William O. Bertelsman
William O. Bertelsman, Judge

Copies to:

Edward C. Monahan
Erwin W. Lewis
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1/23/91 - lbb

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
at Covington

CIVIL ACTION NO. 87-56

EUGENE WILLIAMS [sic] GALL, JR. PETITIONER

VS. **OPINION & ORDER**

GENE SCROGGY, WARDEN RESPONDENT

This matter is before the court upon the motion of petitioner to alter or amend the judgment of January 23, 1991, pursuant to Fed. R. Civ. P. 59, and respondent's objections thereto.

Petitioner moves to alter or amend the judgment based on based on [sic] "newly discovered evidence" pursuant to Rule 59(b). The new evidence consists of the report and opinion of Dr. Eric Engum, who conducted neuropsychological testing on petitioner in

January 1991. Dr. Engum's report concludes that petitioner suffers from organic brain damage; that "[t]hough it is difficult to definitively relate Mr. Gall's organic condition to a particular time or event, it does appear that the condition has persisted for a number of years, probably preceding his initial incarceration in 1971;" and that abnormal behavior exhibited by petitioner is a function of this organic condition, rather than a function of a personality disorder.

Petitioner requests that the court alter its judgment to allow him to present this evidence in support of his petition. He argues that organic brain damage is admissible as part of his insanity defense, that the jurors were consititutionally [sic] required to consider such evidence in mitigation during the penalty phase, and that trial counsel would be deemed ineffective for not discovering or presenting such evidence. He further argues that failure to present this evidence at his trial is not harmless error because "this new evidence is so

dramatic that there is a probability the jury and judge informed about it would come to a different decision at least on sentence."

Motions to alter a judgment based on newly discovered evidence are analyzed identically under Rule 59 and Rule 60. E.g., Davis v. Jellico Community Hosp., Inc., 912 F.2d 129 (6th Cir. 1990); Boryan v. United States, 884 F.2d 767 (4th Cir. 1989); Kalman v. Berlyn Corp., 706 F. Supp. 970 (D. Mass. 1989); Taliaferro v. City of Kansas City, 128 F.R.D. 675 (D. Kan. 1989); 6A Moore, Moore's Federal Practice, 59.08[3]. Evidence is not "newly discovered" if it existed, and could have been discovered by petitioner with the exercise of due diligence, at the latest, prior to the entry of judgment in this matter. See, e.g., Davis, 912 F.2d at 135; Boryan, 884 F.2d 767; Yachts Amer., Inc. v. United States, 779 F.2d 656 (Fed. Cir. 1985), cert. denied sub nom., 479 U.S. 122 (1986).

Appellate counsel has represented petitioner throughout his state appeals and the instant habeas action. In this matter, filed in 1987,

discovery was permitted to be taken by petitioner, and evidentiary hearings held. According to Dr. Engum's report, petitioner's organic brain damage condition has persisted for two decades. Thus the "evidence" is not "new." Petitioner advances no explanation why neuropsychological testing could not have been done prior to the entry of judgment in this matter. Accordingly, petitioner has not met his burden of establishing that he is entitled to relief under Rule 59.

Because petitioner is not entitled to relief under Rule 59, this court expresses no view on whether his "new ground" for relief is unexhausted, waived, or constitutes an attempted amendment to the petition amounting to a successive petition or an abuse of the writ. See e.g., Sanders v. United States, 373 U.S. 1 (1963); Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990); Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987); Landano v. Rafferty, 126 F.R.D. 627 (D.N.J. 1989), rv'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990).

Accordingly, the court, being sufficiently advised, it is ordered that said motion be, and it hereby is, DENIED.

This 19th day of March, 1991

/S/ William O. Bertelsman
William O. Bertelsman, Judge

Copies to:

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Valerie L. Salven/David A. Sexton, AAG

3/19/91 - lbb